FILED
JUL 18 1979
MICHAEL RODAK, JR., CLERK

APPENDICES

IN THE

Supreme Court of the United States

October Term, 1979

78-1853

MCDONNELL DOUGLAS CORPORATION,
Petitioner,

— against —

GENERAL TELEPHONE COMPANY OF CALIFORNIA
AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES J. FOLEY
3855 Lakewood Boulevard
Long Beach, California 90640
(213) 593-6245
Attorney for Petitioner

(Filed: June 8, 1979)

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-3131

MCDONNELL DOUGLAS CORPORATION,
Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendant-Appellee.

OPINION
JAN. 2, 1979

APPEAL from the United States District Court for the Central District of California

Before: CARTER and HUFSTEDLER, Circuit Judges, and C. WILLIAM KRAFT, JR., District Judge.*

CARTER, Circuit Judge:

McDonnell Douglas appeals here from an order granting General Telephone's[1] motion for summary judgment in a suit in which McDonnell sought to recover excise taxes paid over a five and one-half year period on telephone services provided by General Telephone. The thrust of the district court's order was that McDonnell had failed to state any cause of action under applicable federal statutory or common law.

*Honorable C. William Kraft, Jr., Senior District Judge, Eastern District of Pennsylvania, sitting by designation.

McDonnell's appeal presses the view that at least three causes of action were stated: First, General Telephone's collection of excise taxes between 1966 and 1971 violated a duty imposed on General Telephone by the Federal Excise Tax Reduction Act of 1965, 26 U.S.C. §§ 4251-4254 ("the 1965 Act") to conduct its billing practice so as to confer the benefits of the Act on its customers, including McDonnell. Second, General Telephone's billing practice was discriminatory as to McDonnell and thus violated the anti-discrimination provisions of the Federal Communications Act of 1934, 47 U.S.C. § 202 as amended ("the 1934 Act"). Finally, McDonnell argues that General Telephone violated a fiduciary duty owed to its customers, including McDonnell, when it established and carried out the particular billing practices which resulted in McDonnell's having to pay the disputed excise taxes.

General Telephone argues in support of the district court that no cause of action was stated, and also contends that, as to the claim based on discrimination arising out of the 1934 Act, a statute of limitations would preclude recovery anyway. It also argues that it is not a proper party from whom McDonnell should seek a refund of taxes. Rather, section 7422 (f) (1) of the Internal Revenue Code, 26 U.S.C. § 7422 (f) (1) requires that such action be brought only against the United States.

We find that McDonnell has failed to state any cause of action under the federal statutes cited and under the common law. We therefore affirm the decision of the lower court.

I. FACTS

McDonnell is a long-time customer of General Telephone Company of California, a wholly-owned subsidiary of coappellee General Telephone and Electronics Corp. During the time period relevant to this dispute, McDonnell subscribed to at least two different kinds of telephone service from General Telephone: conventional service which gave McDonnell access to the world-wide commercial telephone communications net available to telecommunications users generally, and a private branch exchange (PBX) system which facilitated

McDonnell's internal communications. General Telephone apparently offered PBX systems in different modes, one of which was called "CENTREX" and which was used by McDonnell in its internal communications.

The seeds of this dispute were sown in 1965 when Congress amended the Internal Revenue Code to exempt "private communications service" from federal communications excise taxes. Federal Excise Tax Reduction Act of 1965, 46 U.S.C. §§ 4251-4254. Under these amendments, PBX systems were intended to qualify for the tax exemption, but only if customer were billed separately for internal and external use. *See* H.R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677. CENTREX services received by McDonnell were billed together with conventional telephone services and for that reason, they did not immediately qualify for the exemption. The present dispute matured when General Telephone finally separated its CENTREX and conventional charges at McDonnell's request — five and one-half years after the Excise Tax Reduction Act became effective — but declined to reimburse McDonnell for the taxes paid during that period.

II. ISSUES

A. Does the Excise Tax Reduction Act of 1965 impose a duty upon General Telephone to change its billing practice so as to confer the benefits of the Act on McDonnell?

B. Is General Telephone's billing practice with respect to CENTREX service subject to federal scrutiny so as to give rise to a cause of action under the Federal Communications Act of 1934 where discrimination is alleged? If so, does a statute of limitations bar recovery?

C. Does General Telephone owe a separate common law fiduciary duty to McDonnell to formulate billing policies that would minimize McDonnell's excise taxes?

D.Is General Telephone the proper party from whom McDonnell should seek recovery of the money paid as federal excise taxes?

III. DISCUSSION

A. The 1965 Act

Insofar as it applies to the facts of this case, the 1965 Act provides for an excise tax on local telephone service (26 U.S.C. § 4251(a) (1)), but excludes from coverage of the tax "private communications services . . . [if] a separate charge is made for such service." 26 U.S.C. § 4252(a), (d). Thus McDonnell's CENTREX service was taxed because it was billed to McDonnell along with charges for conventional service. It is clear that Congress contemplated such a result when it passed the 1965 Act. The legislative history of the bill, found in H.R. Rep. No. 433, 89th Cong. 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645 at 1677 states:

> "It is understood that private lines and PBS systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems – where switching equipment is generally on the premises of the local exchange rather than on that of the subscriber – generally do not, as yet, provide for a charge which is separate and distinct from that for local telephone service. Until such separation is made, this exemption, therefore, will not apply in the case of Centrex service."

McDonnell argues that there is implicit in the Act and its legislative history a duty placed upon utilities providing telephone service to separate charges for CENTREX services so that they qualify for the exemption. It supports this argument with the observation that if the Act does not impose such a duty, then it confers upon General Telephone and other utilities excessive discretion to determine whether or not its customers have to pay federal excise taxes. It looks at the words "as yet" and "until" in the text of legislative history and contends they should be interpreted so as to require a change in a utility's billing practice if the service to which a customer subscribes does not qualify for the exemption.

Essentially identical arguments were made in *DuPont Glore Forgan, Inc. v. Am. Tel. & Tel. Co.*, 437 F. Supp. 1104

at 1131 (S.D.N.Y. 1977), aff'd mem., No. 77-6148, 6154 (2d Cir., March 17, 1978), *cert. denied*, 47 U.S.L.W. 3327 (U.S. Nov. 13, 1978) (No. 78-317). In the portion of that opinion directly applicable to this claim, and with which we generally agree,[2] Judge Edward Weinfeld noted that neither the language of the Act nor the legislative history evidence a clear imposition of a duty to establish separate charges for CENTREX service. Furthermore, making a taxpayer's tax liability dependent upon the actions of one of the parties to a particular taxable transaction is not uncommon under the Internal Revenue Code. It follows, therefore, that General Telephone's discretion to separate or not separate CENTREX charges was absolute under the 1965 Act.

In light of Judge Weinfeld's discussion of this issue in 437 F. Supp. at 1131-34, we find it unnecessary to elaborate or cite further authority. We merely hold, consistent with that decision, that the 1965 Act does not impose a duty upon General Telephone to separate charges for CENTREX services from charges for normal telephone services in its bills to McDonnell.

B. The 1934 Act

McDonnell next claims that General Telephone's billing practice violated the anti-discrimination provisions of the 1934 Federal Communications Act, 47 U.S.C. § 202. That section provides as follows:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The discrimination here, McDonnell contends, lies in the fact that its CENTREX costs were higher than fees paid by other

customers of General Telephone who received similar service but happen to have subscribed to a P.B.X. system which was billed separately and thus not subject to the excise tax.

General Telephone counters with the argument that CENTREX service, being entirely intrastate in nature, is exempt from the coverage of the Act under section 152(b) of the Act, which excludes "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier[.]" This provision was clearly intended to give states significant power to regulate wire communications that are wholly intrastate in nature. In the debates which preceded passage of the 1934 Act, Senator Dill, the Senate manager of the bill, stated, apparently with reference to § 152:

> "We have attempted . . . to reserve to the State commissions the control of intrastate telephone traffic [in contrast to the jurisdiction left to the states over intrastate commerce following *Houston, E. & W.T. Ry. v. United States*, 234 U.S. 342 (1914).] . . .
>
> "We have attempted, in this proposed legislation, to safeguard State regulation by certain provision to the effect that where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply. . . . " 78 Cong. Rec. 8823 (1934).

Subsequent decisions interpreting the Act have sought to preserve state control against federal jurisdictional encroachment. *See Kitchen v. F.C.C.*, 464 F.2d 801 (D.C. Cir. 1972); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 494, n. 6 (2d Cir. 1968); *United States v. State Corporation Comm'n*, 455 F. Supp. 843 (E.D. Va. 1972), *aff'd* 409 U.S. 1094 (1973).

We do not wish to unnecessarily expand the scope of federal jurisdiction in this area when it was the clear intent of Congress and other courts to limit that jurisdiction.

Counsel for McDonnell has forcefully and ably argued that what is involved here is not simply intrastate services, as to which the California Public Utilities Commission has ex-

clusive jurisdiction in the first instance, but rather the discriminatory manner in which General Telephone carried out its congressionally mandated duties as a collector of federal excise taxes on those intrastate services. This, it is contended, places what might otherwise be services excluded from the coverage of the 1934 Act under § 152 of that Act back under its coverage because of the federal interest and involvement in the collection of the excise taxes. We find the argument tempting but unpersuasive.

Comparing the language of sections 202 and 152, we note that the language which defines the scope of coverage of the two sections is virtually identical. Section 202 prohibits discrimination in "charges, practices, classifications, regulations, facilities, or services for or in connection with like communication services", and section 152 excludes from coverage of the Act all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services". If, as McDonnell contends, General Telephone's tax collection practices were in violation of § 202 because they constituted "charges, practices, . . . regulations, . . . or services" relating to communications, then it would be inconsistent to argue that those same tax collection practices are not "charges, . . . practices, services, . . . or regulations" relating to intrastate communications services, because CENTREX was almost certainly solely intrastate.[3]

We hold, therefore, that McDonnell has stated no valid claim for damages based on discrimination under the 1934 Act. In light of this holding, it is unnecessary to consider the effect of the statute of limitations found in 47 U.S.C. § 415(b), which General Telephone claims precludes recovery.

C. Fiduciary Duty

McDonnell's third claim is based on the theory that General Telephone's position as a public utility and as the author of the billing practices in question gives rise to fiduciary duties owed to its customers which it breached by collecting unnecessary excise taxes from McDonnell for five and one-half years.

McDonnell cites no case authority for the proposition that a public utility such as General Telephone owes a special fiduciary duty to customers from whom it collects taxes on behalf of the government. There are, however, cases which stand for the proposition that no such fiduciary relationship exists. *Argon v. Illinois Bell Telephone Co.*, 325 F. Supp. 487 (N.D. Ill. 1970), *rev'd on other grounds*, 449 F.2d 906 (7th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972); *Jacob Goodman & Co. v. New York Telephone Co.*, 285 App. Div. 404, 137 N.Y.S.2d 797 (1st Dep't), *aff'd*, 309 N.Y. 258, 128 N.E.2d 406 (1955).

McDonnell derives most of the force of its argument from its interpretation of the Federal Excise Tax Reduction Act of 1965 and from the Federal Communications Act of 1934, discussed above. We see no reason to bootstrap from those two statutes and create a third cause of action in addition to the two already alleged. We therefore affirm that part of the lower court's order dealing with a claim for relief based on an alleged fiduciary duty owed by General Telephone to McDonnell.

IV. CONCLUSION

The order of the lower court is affirmed in all respects. It is therefore unnecessary to deal with General Telephone's contention that it is not to proper party from whom to seek the return of overpaid excise taxes.

FOOTNOTES:

[1]Although both General Telephone Company of California and General Telephone and Electronics Corporation were defendants below and are appellees here, our action affects both in the same way, and they will therefore be referred to under the collective term of "General Telephone".

[2]A portion of Judge Weinfeld's opinion hints that the plaintiff there had failed to make a valid claim for relief under § 202 of the 1934 Act (47 U.S.C. § 202). 437 F. Supp. at 1131, 1134. It is unclear whether he meant that any action which was not violative of the 1965 Act also met the antidiscrimination provisions of the 1934 Act, or whether plaintiff there

merely failed to make the requisite pleadings and proof to persuade the judge of the merits of its claim. We do not rely on that portion of Judge Weinfeld's opinion in our discussion of the 1934 Act.

[3]We are also unpersuaded by McDonnell's contention that CENTREX is not intrastate service because of the capacity it possesses to be patched into interstate telecommunications nets. Aside from the apparent fact that none of the disputed charges here were for calls made from CENTREX phones into interstate nets, the theory which McDonnell tries to develop is inconsistent with the intent of Congress to preserve some state jurisdiction over telecommunications services. If CENTREX service of the type described here becomes interstate merely because it can be connected with other wire systems that are interstate, then it is difficult to imagine what type of telephone service would not qualify as interstate in a similar manner. The lessons of *Kitchen* and *State Corporation Comm'n, supra*, suggest McDonnell's argument should be discarded, and we do so in light of the facts presented here.

We are likewise unpersuaded by McDonnell's argument that, because General Telephone was declared to be an interstate common carrier in *General Telephone Co. of California v. F.C.C.*, 413 F.2d 390 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969), the antidiscrimination provisions of § 202 of the Act apply here. This misses the point. A carrier may be an interstate "common carrier" within the meaning of § 202 in some instances but not in others, depending on the nature of the activity which is subject to scrutiny. Otherwise, § 152 has little meaning. *See National Ass'n of Reg. Util. Com'rs v. F.C.C.*, 533 F.2d 601 (D.C. Cir. 1976).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-3131

MCDONNELL DOUGLAS CORPORATION,

Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND GENERAL TELEPHONE AND ELECTRONICS CORPORATION,

Defendants-Appellees.

ORDER
FEB. 16, 1979

Before: CARTER, Circuit Judge

Defendant-appellee General Telephone Company of California is requested to file a supplemental brief responding to plaintiff-appellant McDonnell Douglas' petition for rehearing with suggestion for rehearing en banc, and particularly to the following issue, namely, whether the characterization of CENTREX service as intrastate within the meaning of section 152 of 47 U.S.C. is a disputed question of fact.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 75-3131

MCDONNELL DOUGLAS CORPORATION,
Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendants-Appellees.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC APRIL 25, 1979

Before: CARTER and HUFSTEDLER, Circuit Judges, and KRAFT, District Judge.

The panel in the above entitled case having voted unanimously to deny the petition for rehearing; and the suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for rehearing en banc,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-3131

MCDONNELL DOUGLAS CORPORATION,
Plaintiff-Appellant,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendants-Appellees.

ORDER STAYING ISSUANCE OF MANDATE
MAY 9, 1979

Before: CARTER, Circuit Judge

Upon the application of James J. Foley, Esq., counsel for the appellant herein, IT IS ORDERED that the issuance of the certified copy of the judgment of this Court in the above cause be stayed pending the filing of a petition for writ of certiorari to the Supreme Court of the United States, provided such petition is filed in the Clerk's Office of the Supreme Court on or before June 8, 1979.

FOR THE COURT:
by direction

EMIL E. MELFI, JR.
Clerk of Court

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 74-378-F

MCDONNELL DOUGLAS CORPORATION,

Plaintiff,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND GENERAL TELEPHONE & ELECTRONICS CORPORATION,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
AUG. 8, 1975

The above-entitled action came on for hearing on the motions for summary judgement by defendants (General Telephone Company of California and General Telephone & Electronics Corporation) and plaintiff (McDonnell Douglas Corporation) in their respective favor. The court, having considered the pleadings, the evidence and the oral and written arguments of the parties, now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. Identification of Parties

1.1 Plaintiff McDonnell Douglas Corporation ("McDonnell") is a corporation organized under the laws of Maryland. (Amended Complaint, ¶ 1.)

1.2 Defendant General Telephone & Electronics Corporation ("GTE") is a corporation organized under the laws of New York. (Amended Complaint, ¶ 2.)

1.3 Defendant General Telephone Company of California ("GTC") is a corporation organized under the laws of California. (Amended Complaint, ¶ 3.) GTC is a wholly-owned subsidiary of GTE. (Amended Complaint, ¶ 3; Answer of GTC, ¶ 4; Answer of GTE, ¶ 3.)

1.4 GTC provides telephone communication services to McDonnell. (Amended Complaint, ¶ 3.) The services furnished by GTC to McDonnell include Centrex telephone communication services at McDonnell's facilities in Long Beach and Huntington Beach, California. (Hester Affidavit, ¶¶ 2, 7.)

2. Background Facts

2.1 A conventional Private Branch Exchange ("PBX") telephone communication system provides to a subscriber of PBX service the capability to engage both in intraoffice telephone communications and in telephone communications with the external telephone network. (Amended Complaint, ¶ 4F; Hester Affidavit, ¶ 3.) The switching equipment used in providing conventional PBX service is physically located on the premises of the customer and is connected to the external telephone network by connecting lines ("trunks") to the local exchange of the telephone company which provides the PBX service. (Amended Complaint, ¶ 4F; Hester Affidavit, ¶ 3.)

2.2 Centrex telephone communication service as provided by GTC is a type of dial PBX service. (Amended Complaint, ¶ 4G; Hester Affidavit, ¶ 3.) In a Centrex system furnished by GTC, the switching equipment is located entirely on the premises of GTC. (Amended Complaint, ¶ 4G; Hester Affidavit, ¶ 4.) Centrex switching equipment is connected directly to the external telephone network by numerous connecting links, rather than by a comparatively small number of trunk lines as with conventional PBX equipment. (Hester Affidavit, ¶ 4.)

2.3 A Centrex system offers certain communications features or facilities in addition to those available with a conventional PBX system. (Hester Affidavit, ¶¶ 3-4.)

3. The Federal Excise Tax on Telephone Communication Services

3.1 During the time relevant to this action, telephone communication services that have access to or from the external telephone network have generally been subject to federal excise tax. Internal Revenue Code, 26 U.S.C. §§ 4251-4254. (Amended Complaint, ¶ 5.)

3.2 The Excise Tax Reduction Act of 1965 (the "1965 Act"), 79 Stat. 136 (1965), amended the Internal Revenue Code to exempt "private communications service" from the excise tax imposed on "local telephone service," effective January 1, 1966. 26 U.S.C. § 4252(a). As amended by the 1965 Act, 26 U.S.C. § 4252(d) defines "private communications service" as service and equipment used for intercommunication among a subscriber's telephone stations, "except that such term does not include any [such] communications service unless a separate charge is made for such service." (Amended Complaint, ¶ 5.)

3.3 Centrex service in connection with purely intraoffice telephone communications is a local telephone service which can qualify as "private communications service," and if a separate charge is imposed for such service is therefore exempt from federal excise tax. (Amended Complaint, ¶ 6.)

3.4 The rates charged by GTC for conventional PBX service have always consisted of two separate charges, separately set forth in the applicable tariff filed with the California Public Utilities Commission (the "Commission"). One charge is for the use of the PBX switching equipment located on the customer's premises and the second and separate charge is for the use of the trunks which provide access to the local exchange of GTC and thus access to the external telephone network. (Amended Complaint, ¶ 4F; Hester Affidavit, ¶ 5.)

Because of the existing separation of charges for PBX service, the charge for PBX intraoffice communication service was immediately exempt from federal excise tax on the date the 1965 Act became effective. (*See* Amended Complaint, ¶ 7.)

3.5 Commencing July 25, 1964, when GTC first offered Centrex service to its customers, GTC's charges for Centrex service were governed by a tariff filed with the Commision which imposed a single charge for intraoffice service and exchange access applied against the total number of individual telephone receivers within the system. (Amended Complaint, ¶ 4G; Hester Affidavit, ¶ 6.) Effective August 10, 1971, GTC revised its Centrex tariff on file with the Commission to separately state charges for (1) intraoffice services and (2) exchange access. (*See* Amended Complaint, ¶ 9; Hester Affidavit, ¶¶ 12-13.)

3.6 Prior to August 10, 1971, McDonnell was assessed and paid federal excise taxes on the entire amount of GTC's charges for Centrex intraoffice communication service and exchange access. (Amended Complaint, ¶ 22.) Subsequent to August 10, 1971, McDonnell has not been assessed nor has it paid federal excise taxes on GTC's charges for Centrex intraoffice service. (Amended Complaint, ¶ 25.)

4. The Changeover from a Unitary to Separate Centrex Charges

4.1 Pursuant to a tariff filed with the Commission which became effective in March 1969, GTC was authorized to provide and offered a new type of PBX service which incorporated many but not all of the features and facilities supplied by a Centrex system. As with GTC's prior PBX tariffs, the tariff incorporated two separate charges (i.e., for intraoffice switching and trunk access). (Hester Affidavit, ¶ 8.)

4.2 As a result of a request by McDonnell, GTC commenced studies in the latter part of 1970 preparatory to dividing the single station rate for Centrex service into two

components; (1) a charge for intraoffice communications service and (2) a separate charge for access to and from the external telephone network. (Hester Affidavit, ¶ 9.) Those studies revealed that a separation of charges based on the actual costs associated with supplying each of the two aspects of Centrex service was impractical. (Hester Affidavit, ¶ 11.)

4.3 Since the intraoffice services provided by the more advanced PBX system referred to in subparagraph 4.1, *supra*, were substantially the same as those provided by a Centrex system, GTC determined that the separate charge for Centrex intraoffice services should be the same as the comparable charge for intraoffice services supplied by the more advanced PBX system. The remainder of the previously unitary rate for Centrex service was then allocated as the charge for exchange access in a Centrex system. (Hester Affidavit, ¶ 12.)

4.4 The method of computing the division of the previously unitary Centrex charge into two components as set forth in subparagraph 4.3, *supra*, was not the only method available to GTC. (Hester Supplemental Affidavit, ¶ 5; Evans Supplemental Affidavit, ¶ 5.) The decision by GTC to use this particular method was made in the exercise of rate-making judgment by GTC. (Hester Supplemental Affidavit, ¶ 5.)

4.5 The separation of Centrex charges which became effective August 10, 1971 did not derive from any antecedent separation of such charges which was set forth in GTC's books and records relating to Centrex charges, except as set forth in subparagraphs 4.3 and 4.4, *supra*. Prior to the effectiveness of the revised Centrex tariff there was no separation of any kind of Centrex charges on GTC's books and records. (Hester Affidavit, ¶ 14.)

5. The Intrastate Character of Centrex Communication Services

5.1 Centrex service is a local telephone exchange service. GTC's rates and charges for Centrex service are solely for intrastate communication service and do not include any compo-

nent for interstate communication service. (Hester Affidavit II, ¶ 1.)

5.2 GTC's rates and conditions with respect to Centrex service are contained in tariffs filed with the California Public Utilities Commission. GTC does not make any filings with the Federal Communications Commission with respect to Centrex service. (Hester Affidavit, ¶ 2.)

6. General

6.1 The Court finds in all respects as set forth in the Conclusions of Law following these findings of fact.

CONCLUSIONS OF LAW

(1) The Court concludes in all respects as set forth in the foregoing Findings of Fact.

(2) Said findings having been made upon issues which are determinative of the cause, any further findings or findings upon issues other than those embraced in the foregoing findings would be immaterial and are not made for that reason.

(3) The jurisdiction of this Court is based on 28 U.S.C. §§ 1331 and 1332 and the doctrine of pendent jurisdiction. The amount in controversy in this case exceeds $10,000 exclusive of interest and cost. Venue is proper in this district under the provisions of 28 U.S.C. § 1391.

(4) When Congress enacted the 1965 Act into law, it did not mandate that Centrex charges for intraoffice communications be separately imposed and stated within a reasonable time, or within any time at all.

(5) GTC is required by law to act as uncompensated tax collector on behalf of the United States in collecting telephone excise taxes from McDonnell. 26 U.S.C. § 4291. The relationship between McDonnell as taxpayer of federal telephone excise taxes and GTC as tax collector of such taxes is that of

debtor and creditor, and the status imposed on GTC as tax collector does not give rise to any fiduciary duties owing to McDonnell. GTC's status as tax collector did not thereby impose any obligation or duty on GTC to seek to minimize the telephone excise taxes owing by McDonnell to the United States with respect to Centrex service furnished by GTC to McDonnell.

(6) GTC's manner of charging for Centrex service is a practice required to be incorporated in tariffs filed with the California Public Utilities Commision and subject to its approval. California Public Utilities Code §§ 489, 728 and 761. The lawfulness of GTC's manner of charging for Centrex services depends upon whether such practice is "just and reasonable" within the meaning of California Public Utilities Code § 451.

(7) The California Public Utilities Commission has jurisdiction to determine whether GTC's manner of charging for Centrex service complies with the requirement that it be "just and reasonable." California Public Utilities Code §§ 728, 761. Further, at all relevant times, California Public Utilities Code § 1702 gave to McDonnell the right to initiate proceedings before the Commission to determine whether GTC's manner of charging for Centrex service was not "just and reasonable" and therefore unlawful. If the Commission determined as a result of any such proceeding that the practice was unlawful, it would be required by law to prescribe the practice to be followed thereafter. California Public Utilities Code §§ 728, 761. The Commission at all relevant times had the authority to determine whether, and if so when, GTC should have revised its Centrex tariff to separately impose and state charges for Centrex intraoffice service.

(8) Under California law, McDonnell's right to initiate proceedings before the California Public Utilities Commission was its sole remedy to obtain a determination of whether GTC's manner of charging for Centrex service prior to August 10, 1971 was unlawful. The Commission has exclusive jurisdiction, under California law, to determine whether any

practice subject to its jurisdiction is not "just and reasonable," and therefore unlawful. Accordingly, this Court has no jurisdiction to determine whether GTC's failure to revise its Centrex tariff sooner than August 10, 1971 was unlawful under California law.

(9) Centrex telephone communication service as furnished by GTC to McDonnell prior to August 10, 1971 was "local telephone service" within the meaning of the Internal Revenue Code, 26 U.S.C. § 4252(a). Centrex service is a local telephone exchange service. 47 U.S.C. § 153(r).

(10) Centrex telephone communication service is intrastate communication service subject to regulation by the California Public Utilities Commission, and therefore is not subject to the requirements of 47 U.S.C. § 202, which prohibits discriminatory or preferential rates or practices in connection with interstate communication service. 47 U.S.C. §§ 152(b)(1), 221(b).

(11) The fact, if true, that prior to August 10, 1971, GTC's charges for Centrex service were "separable" by making some mechanical computation using cost data and accounting records available to GTC into separate components, including one for intraoffice communication service, would not give rise to a "separate charge" for Centrex intraoffice communication service within the meaning of 26 U.S.C. § 4252(d). Thus, there was no overpayment by McDonnell prior to August 10, 1971 of federal telephone excise taxes in respect of the Centrex service furnished by GTC.

(12) Any claim for refund of an overpayment of telephone excise taxes may be maintained only against the United States. 26 U.S.C. § 7422(f)(1).

(13) There is no genuine issue as to any material fact, and defendants are entitled to judgment against plaintiff as a matter of law and to recover their costs.

DATED: August 8, 1975.

_____
United States District Judge

Submitted by:

O'MELVENY & MYERS
SIDNEY H. WALL
JOHN H. ZUROMSKIS

By _____
John H. Zuromskis

Approved as to form:

JAMES J. FOLEY

By _____
James J. Foley

STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

Juanita M. Newcomb, being first duly sworn deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 3900 Crocker Bank Plaza, 611 West Sixth Street, Los Angeles, California 90017.

That on July 11, 1975, affiant served the within

FINDINGS OF FACT AND CONCLUSIONS OF LAW

upon counsel named below by depositing a true copy thereof in a United States mail box at Los Angeles, California, in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Newman L. Dotson, Esq.
John L. Rich, Esq.
James J. Foley, Esq.
George R. Hill, Esq.
5301 Bolsa Avenue
Huntington Beach, California 92647

That there is a regular communication by mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me this 11th day of July, 1975.

Notary Public in and for the State of California

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 74-378-F

MCDONNELL DOUGLAS CORPORATION,
Plaintiff,

v.

GENERAL TELEPHONE COMPANY OF CALIFORNIA AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AUG. 8, 1975

The motions of defendants (General Telephone Company of California and General Telephone & Electronics Corporation) and plaintiff (McDonnell Douglas Corporation) for summary judgment in their respective favor pursuant to Rule 56 of the Federal Rules of Civil Procedure having come on for hearing before the Court, the Honorable Warren J. Ferguson, District Judge, presiding; the Court having duly heard argument on the issues, and considered the pleadings in the action and the papers and affidavits filed in support of and in opposition to said motions; and a decision having duly been rendered in accordance with the accompanying findings of fact and conclusions of law:

IT IS ORDERED AND ADJUDGED that defendants' motion is granted and plaintiff's motion is denied, that plaintiff take nothing, that the action be dismissed on the merits, and

that said defendants General Telephone Company of California and General Telephone & Electronics Corporation recover of plaintiff McDonnell Douglas Corporation their costs of action.

DATED at Los Angeles, California this 8th day of August, 1975.

UNITED STATES DISTRICT JUDGE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Juanita M. Newcomb, being first duly sworn deposes and says:

That affiant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years, and not a party to or interested in the within action; that affiant's business address is 3900 Crocker Bank Plaza, 611 West Sixth Street, Los Angeles, California 90017.

That on July 11, 1975, affiant served the within

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

upon counsel named below by depositing a true copy thereof in a United States mail box at Los Angeles, California, in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Newman L. Dotson, Esq.
John L. Rick, Esq.
James J. Foley, Esq.
George R. Hill, Esq.
5301 Bolsa Avenue
Huntington Beach, California 92647

That there is a regular communication by mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me
this 11th day of July, 1975.

Notary Public in and for the State of
California

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 74-378-F

MCDONNELL DOUGLAS CORPORATION,
Plaintiff,

v.

GENERAL TELEPHONE COMPANY OF AMERICA AND
GENERAL TELEPHONE AND ELECTRONICS CORPORATION,
Defendant.

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEYS OF RECORDS:

You are hereby notified that order granting summary judgment in favor of defendants and denying plaintiff's motion for summary judgment in the above entitled case was entered in the docket on August 8, 1975.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office after the expiration of thirty days from the receipt of this notice. (After sixty days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on August 8, 1975, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

O'Melveny and Myers 611 West Sixth Street Los Angeles, Ca. 90017	James J. Foley, Esq. 5301 Bolsa Avenue Huntington Beach, Ca. 92647

EDWARD M. KRITZMAN, CLERK

BY _____
DEPUTY CLERK

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT AND THE EMERGENCY PETROLEUM ALLOCATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.